UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 10

UNIVERSAL HEALTHCARE SYSTEMS
d.b.a. LAUREL HEIGHTS HOSPITAL

Employer

and **CASE 10-RC-15216**

LOCAL UNION 438, LABORERS INTERNATIONAL
UNION OF NORTH AMERICA, AFL-CIO, CLC

Petitioner

UNIVERSAL HEALTHCARE SYSTEMS
d.b.a. LAUREL HEIGHTS HOSPITAL

Employer

and **CASE 10-RC-15217**

LOCAL UNION 438, LABORERS INTERNATIONAL
UNION OF NORTH AMERICA, AFL-CIO, CLC

Petitioner

ORDER SEVERING CASES AND DECISION AND DIRECTION OF ELECTION

On May 30, 2001, an Order Consolidating Cases and Notice of Representation Hearing issued in the above entitled proceeding. On June 7, 2001, the parties entered into a Stipulated Election Agreement in Case 10-RC-15216 while proceeding to hearing in Case 10-RC-15217. On June 12, 2001, the Regional Director approved the Stipulation in Case 10-RC-15216. Having considered the foregoing,

IT IS HEREBY ORDERED that Case 10-RC-15216 be and, it hereby is, severed from this proceeding.

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, a hearing was held in remaining Case 10-RC-15217 before a hearing officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this case to the undersigned.

Upon the entire record in this case, the undersigned finds:[1]

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is a Pennsylvania corporation with an office and place of business located in Atlanta, Georgia, where it is engaged in providing in-patient psychiatric health care services to children and adolescents. During the past twelve months, a representative period, the Employer has, from its Atlanta, Georgia operation, received gross revenues in excess of $250,000 and has purchased and received at its Atlanta, Georgia facility goods valued in excess of $50,000 directly from suppliers located outside the State of Georgia. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act and claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. There is no history of collective bargaining at the Atlanta, Georgia location.

6. As amended at the hearing, Petitioner seeks to represent a unit of all full-time and regular part-time professional employees at the Employer's Atlanta, Georgia facility, including mental health assistants, PRN mental health assistants, licensed practical nurses, registered nurses, teachers, behavioral specialists and recreational therapists, but excluding all other employees, office clerical employees, guards and supervisors as defined in the Act.[2]

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[1] The Employer and Petitioner filed briefs which were duly considered. At the hearing it was agreed that the Employer would submit additional payroll records to make its Exhibit 2 more complete and correct. On June 8, 2001, the agreed supplemental documents were submitted. They are hereby received and have been duly considered.

[2] In the record, the "mental health assistants" are also sometimes referred to as "mental health associates." However, since the Director of Nursing explicitly testified that the correct title is "assistant," I have adopted that terminology here.

With the exception of the PRN mental health assistant classification (hereafter called PRN-MHA), the parties are in agreement concerning the unit. The Employer would exclude the PRN-MHAs as casual employees while Petitioner seeks their inclusion as regular part-timers. Additionally, if the PRN-MHAs are found to be appropriately included in the unit, the Employer would limit eligibility to those who have worked a minimum of 120 hours in either of the two calendar quarters immediately preceding the eligibility date, as set forth in Marquette General Hospital, 218 NLRB 713 (1975), rather than the standard enunciated in Davison-Paxon Co., 185 NLRB 21 (1970), finding eligible those on-call employees who average four or more hours of work per week for the last quarter prior to the eligibility date. Petitioner took no position regarding which standard should be applied but reserved its right to object if it concludes that the evidence fails to support the standard applied.

There are about 61 PRN-MHAs. These are "on call" employees who fill in as needed for the regularly scheduled full and part-time mental health assistants (hereafter called MHAs). Three or four MHAs are needed in each of the Employer's seven units on day and evening shifts and one or two on night shift, seven days a weeks. When hired, PRN-MHAs are advised that the Employer expects them to work a minimum of four shifts per month, but this requirement may be waived in some instances.

PRN-MHAs provide the Employer with advance information about their availability. Based on this information, they are scheduled or called in to work in whichever units most need them. About 80 percent of PRN-MHAs have other jobs. It is undisputed that there are frequent transfers from PRN-MHA to full time MHA positions, and that a number of employees also transfer from full-time to on-call status. The on-call list is updated about every six weeks.[3]

When employees who are regularly scheduled are out for vacation, illness or any other reasons, or when there are unfilled vacancies, the Employer utilizes the PRN-MHAs to fill in.[4] These employees work side-by-side with the regularly scheduled MHAs as part of the same "treatment team" providing direct patient care for all patients on the team and performing the same core functions under the same supervisory structure. The primary responsibility of both classifications is to know the whereabouts of the patients under the team's care and to ensure

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[3] There was testimony that turnover is "fairly high," but specific figures were not given, nor any definite numbers regarding the extent to which changes to the on-call list are due to internal transfers.

[4] At the time of the hearing, there where 6 full time MHA vacancies.

their safety. However, the MHAs are also assigned as "primaries" for particular individuals under their care and as such participate more fully than a PRN-MHA in the treatment plan for those individuals, both in terms of attending shift report and monthly treatment plan meetings and in terms of documenting behaviors.[5] Both classifications do, however, report observations, document behavior and participate in shift report meetings as their availability permits. The on-call employees generally miss more shift report meetings than the regularly scheduled employees by virtue of more often arriving after the start of a shift.

The same job description, disciplinary rules, handbook, base pay rate, overtime policies, payroll procedure, orientation period, and 90-day and annual evaluation procedures cover both MHAs and PRN-MHAs. There are no differences in educational, training, licensing, or certification requirements. There are no distinctive uniforms or insignia differentiating the MHAs from the PRN-MHAs. All employees share the same staff lounge. However, MHAs undergo monthly reviews providing feedback by team leaders while PRN-MHAs do not. MHAs also enjoy various benefits not provided to on-call employees, including health insurance, life and accidental death and dismemberment insurance, disability insurance, tuition reimbursement, paid leave of absence coverage, vacations and a 401(k) plan.

Based upon all of the foregoing, I find that the PRN-MHAs are appropriately included in the unit. I base this conclusion primarily on the frequent transfers between PRN-MHAs and MHAs and on the fact that they perform the same core functions, working side-by-side as part of a team and sharing most of the same working conditions and supervisory structure. While some differences exist as dictated by the nature of on-call employment, the differences are insufficient to overcome the substantial similarities demonstrated by the testimony of the witnesses for both parties. Moreover, differences between the full-time and on-call employees with respect to benefits are insufficient to warrant exclusion from the unit. *S. S. Joachin & Anne Residence*, 314 NLRB 1191,1193 at fn 5 (1994).

A closer question is whether the eligibility formula set forth in *Davison-Paxon Co.,* 185 NLRB 21 (1970) should be applied in this case rather then the standard utilized in *Marquette General Hospital*, 218 NLRB 713 (1975). Under the *Marquette* formula favored by the Employer, those eligible to vote would include all employees who have worked a minimum of 120 hours in either of the two calendar quarters immediately preceding the eligibility date. If those quarters are similar to the quarters preceding the hearing for which records are in evidence,

[5] As an example, PRN-MHAs “rarely” attend monthly treatment plan meetings. MHAs attend such meetings "when

about 18 of 61 employees would be ineligible to vote under the *Marquette* formula. Under the more commonly utilized *Davison-Paxon* formula, those eligible to vote would include all employees who averaged 4 or more hours of work per week for the last quarter prior to the eligibility date. Using this formula, about 9 employees would be ineligible.

The *Marquette* standard was established to deal with wide disparities in hours worked. As the Employer contends, significant disparities do exist in this case. Eliminating those who worked zero hours in a quarter,[6] on-call employee hours worked per quarter range from 6 hours to 735.5 hours. However, in *S.S. Joachim*, supra at 1193, wide disparities among a smaller group of on-call employees was found insufficient to warrant use of the *Marquette* standard so long as most employees work within a narrower range. In *Joachim,* 9 of 13 on-call employees ranged between 200 and 400 hours per quarter, once the extremes were eliminated, and the *Marquette* standard was rejected in favor of *Davison-Paxon.* See also *Sisters of Mercy Health Corp.* 298 NLRB 483 (1990). In more recent cases where an Administrative Law Judge or Regional Director has applied *Marquette,* the Board has reversed on other grounds and declined to rule on the eligibility formula. See, e.g., *Crittenton Hospital,* 328 NLRB 879 at fn 4 (1999).

In the present case, the distribution of hours for the last quarter before the hearing, January through March 2001, was as follows:

HOURS	NUMBERS OF EMPLOYEES	
Over 700		1
600-700	2	
500-600	1	
400-500	2	
300-400	9	
200-300	11	
100-200	10	
less than 100 (but not zero hours)		21

possible."

[6] Obviously, zero hours may mean an employee has not yet been hired or has not yet been struck from the list after leaving because of separation or internal transfer.

Given the larger numbers of employees involved, the fact that only 6 employees worked in the top half of the hours categories set forth above compared to 50 in the bottom half, and the Board's apparent preference for the more commonly utilized *Davison-Paxon* standard, an argument could be made that the *Davison-Paxon* should be applied here.

In the present case, however, no party has taken a position in opposition to the *Marquette* standard, and the numbers set forth above show that its application is neither unreasonable nor contrary to established precedent. Therefore, I find that those on-call employees who have worked a minimum of 120 hours in either of the two 3-month periods immediately preceding the date of issuance of this Decision and Direction of Election shall be eligible to vote.

Accordingly, based upon the agreements of the parties and the foregoing facts and conclusions, I further find that the following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time professional employees, at the Employer's Atlanta, Georgia facility, including mental health assistants, PRN mental health assistants, licensed practical nurses, registered nurses, teachers, behavioral specialists and recreational therapists, but excluding all other employees, office clerical employees, guards and supervisors as defined in the Act.[7]

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time set forth in the notice of election to issue subsequently, subject to the Board's Rules and Regulations.[8] Eligible to vote are those in the unit who are employed during the payroll period ending immediately preceding the date of the Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced

[7] The parties agreed, and on the record I find, that the following individuals are supervisors within the meaning of the Act and who are not eligible to vote: Pat Kullen, Jeannette Bell, Anne Boone, Chris Smith, Randy Battles, Natasha Dedijer-Turner, Jason Snow, Erin Moore, Jamie Weddington, Alie Redd, Lisa Wilson, Clint Payne, Jean Kelly, Connie Cline and Erin Smullen.

[8] Your attention is directed to Section 103.20 of the Board's Rules and Regulations, a copy of which is enclosed. Section 103.20 provides that the Employer must post the Board's official Notice of Election at least three full working days before the election, excluding Saturdays and Sundays, and that its failure to do so shall be grounds for setting aside the election whenever proper and timely objections are filed.

less than 12 months before the election date and who retained the status as such during the eligibility period and their replacements. Those in the military services of the United States Government may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining purposes by Local Union 438, Laborers International Union of North America, AFL-CIO, CLC.

LIST OF VOTERS

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co*., 394 U.S. 759 (1969). Accordingly, it is hereby directed that 2 copies of an election eligibility list, containing the full names and addresses of all the eligible voters, must be filed by the Employer with the Regional Director for Region 10 within 7 days of the date of this Decision and Direction of Election. I shall, in turn, make the list available to all parties to the election. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be clearly legible. In order to be timely filed, such list must be received in the Regional Office, Harris Tower – Suite 1000, 233 Peachtree St. N.E., Atlanta, Georgia, 30303-1531, on or before July 10, 2001. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under provision of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 - 14th Street, NW, Washington, DC 20570. This request for review must be received by the Board in Washington by July 17, 2001.

Dated at Atlanta, Georgia, this 3rd day of July, 2001.

/s/ Martin M. Arlook
Martin M. Arlook, Regional Director
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